SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

09/17/2002 CLERK OF THE COURT
FORM L000

HONORABLE MICHAEL D. JONES P. M. Espinoza
Deputy

LC 2001-000858

FILED: _____

STATE OF ARIZONA CARRIE M COLE

v.

CRAIG JUDSON BROWDER PATRICK E ELDRIDGE

FINANCIAL SERVICES-CCC
REMAND DESK CR-CCC
SCOTTSDALE CITY COURT

MINUTE ENTRY

SCOTTSDALE CITY COURT

Cit. No. #1480459

Charge: 1. FAILURE TO DRIVE IN A SINGLE LANE
2. SPEED GREATER THAN REASONABLE AND PRUDENT
3. DRIVING WHILE IMPAIRED
4. BAC .10 OR HIGHER WITHIN TWO HOURS OF DRIVING
5. EXTREME DUI

DOB: 11/22/60

DOC: 04/07/01

09/17/2002 CLERK OF THE COURT
FORM L000

HONORABLE MICHAEL D. JONES P. M. Espinoza
Deputy

LC 2001-000858

This Court has jurisdiction of this appeal pursuant to the Arizona Constitution Article VI, Section 16, and A.R.S. Section 12-124(A).

This matter has been under advisement since the time of oral argument on August 26, 2002. This decision is made within 30 days as required by Rule 9.8, Maricopa County Superior Court Local Rules of Practice. This Court has considered the record of the proceedings from the Scottsdale City Court, the Memoranda and arguments of counsel.

Appellant, Craig Judson Browder, was accused on April 7, 2001 of the crimes of: (1) Failure to Drive Within a Single Lane, a civil traffic matter in violation of A.R.S. Section 28-729.1; (2) Speed Greater than Reasonable and Prudent, a civil traffic matter in violation of A.R.S. Section 28-701(A); (3) Driving While Intoxicated, a class 1 misdemeanor in violation of A.R.S. Section 28-1381(A)(1); (4) Driving with a Blood Alcohol Content of .10 or Higher Within 2 Hrs of Driving, a class 1 misdemeanor in violation of A.R.S. Section 28-1381(A)(2); and (5) Extreme DUI, a class 1 misdemeanor in violation of A.R.S. 28-1382(A). Appellant entered pleas of not guilty to these charges. Appellant filed a Motion to Dismiss based upon an alleged violation of his right to counsel. The trial court held an evidentiary hearing on this motion on September 4, 2001. At the conclusion of the evidentiary hearing, the court took that issue under advisement and by a later minute entry dated September 5, 2001, denied Appellant’s Motion to Dismiss. The parties submitted the issue of guilt or innocence to the trial court and waived their rights to a jury. Appellant was found guilty/responsible of all charges. Appellant has filed a timely Notice of Appeal in this case.

The only issued raised by the Appellant is his contention that the trial court erred in denying his Motion to Dismiss. Appellant asserts that his right to counsel was violated by the Scottsdale Police refusal to allow Appellant to call his friend

(a bartender working in a bar) and by the imposition of a time limit upon Appellant's attempts to contact counsel by telephone.

A DUI suspect has a limited right to a "reasonable opportunity to consult with an attorney" by telephone. This right is limited by the requirement that a Defendant's exercise of the right to consult with an attorney must not interfere with the State's need to timely collect evidence of intoxication.[1]

The trial court made specific and detailed findings of fact in its denial of Appellant's Motion to Dismiss:

> ...the Court finds that the Defendant, after having exercised his right to contact legal counsel, was afforded a reasonable opportunity to contact legal counsel of his choice for at least 30 minutes. The testimony of the Defendant was that between 12:40 a.m. and 1:10 a.m., he could have made more phone calls but waited for the returned telephone call of an attorney at whose telephone number the Defendant had left a message. Because it became time critical to draw blood within two hours of driving and the apparent unwillingness of the Defendant to allow the blood draw to take place (since a warrant had to be obtained) the investigating officer curtailed the Defendant's telephone usage. The refusal to allow the Defendant to use a phone at the hospital was in the officer's concern for safety and not a limitation upon Defendant's right to contact an attorney. Lastly, Defendant testified that he was released from custody within an hour of the blood draw which would have allowed the Defendant time to contact counsel for the purpose of preserving any evidence.

[1] Kunzler v. Superior Court, 154 Ariz. 568, 744 P.2d 669 (1987).

> Accordingly, the court finds that the Defendant was not deprived of his constitutional right to counsel and his Motion to Dismiss is therefore denied.[2]

The trial judge's rulings are supported by the record which reflect that Appellant had at least 30 minutes to telephone and speak with an attorney. This was certainly a "reasonable opportunity" to contact and consult with counsel.

Though not raised by either party, Appellant was convicted of Counts 4 and 5 (Count 4 is Driving with a Blood Alcohol Content of .10 or Higher, and Count 5 is Extreme DUI) and it appears that these charges are multiplicitous. These double jeopardy issues are questions of law which must be reviewed *de novo* by this Court.[3]

The double jeopardy clauses in the United States and Arizona Constitutions prohibit conviction for an offense and its lesser included offense.[4] The crime of Driving with a Blood Alcohol Content Greater than .10 or more [A.R.S. Section 28-1381(A)(2)] is a lesser offense of Extreme DUI. The elements for each crime are identical with the exception that the crime of Extreme DUI requires an additional element of having a blood alcohol content greater than .18. The test for a lesser included offense was summarized by Judge Erlich in State v. Welch,[5] as:

> An offense is a lesser included offense if it is composed solely of some, but not all, of the elements of the greater offense so that it is impossible to commit the greater offense without also committing the lesser. Put another

[2] Minute entry of September 5, 2001.
[3] *State v. Welch*, 198 Ariz. 554, 12 P.3d 229 (App. 2000).
[4] Id.
[5] Id., 198 Ariz. at 556, 12 P.3d at 231.

> way, the greater offense contains each element of the lesser offense plus one or more elements not found in the lesser (citations omitted).[6]

When two convictions are based on one act, and one is the lesser included offense of the other, the lesser conviction must be vacated.[7]

For the reason that the appropriate remedy appears to this Court to be to vacate the conviction of Count 4 [Driving with a Blood Alcohol Content Greater than .10, in violation of A.R.S. Section 28-1381(A)(2)], this Court need not address a multiple (double) punishment argument that might be made. Clearly, A.R.S. Section 13-116 is not violated when this Court vacates the conviction for Count 4.

This Court, therefore, concludes, as did the Court of Appeals in State v. Welch[8] that vacating the conviction of the lesser included offense is the appropriate and correct remedy in this case.

IT IS ORDERED vacating Appellant's conviction for the crime in Count 4, Driving with a Blood Alcohol Content in Excess of .10, a class 1 misdemeanor in violation of A.R.S. Section 28-1381(A)(2).

IT IS FURTHER ORDERED affirming Appellant's convictions and findings of responsibility in Counts 1, 2, 3, and 5.

IT IS FURTHER ORDERED remanding this case back to the Scottsdale City Court for all further and future proceedings in this case.

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[6] Id., citing *State v. Cisneroz*, 190 Ariz. 315, 317, 947 P.2d 889.891 (App.1997).
[7] Id.; State v. *Chabolla-Hinojosa*, 192 Ariz. 360, 965 P.2d 94 (App.1998); *State v. Jones*, 185 Ariz. 403, 916 P.2d 1119 (App.1995).
[8] Supra.